

United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ADOBE SYSTEMS INCORPORATED,  
Plaintiff,

v.

LA BOUTIQUE DU SOFTWARETECH  
INC., a Canadian Corporation doing business  
as SOFTWARE TECH and SOFTWARE  
TECH STORE; FUTUR-SOFT  
SOLUTIONS CORPORATION, a New  
York Corporation; PIERRE FRANCIS, an  
Individual; and DOES 3-10, Inclusive,  
Defendants.

Case No. 5:14-cv-02140-RMW (HRL)

**ORDER RE DISCOVERY DISPUTE  
REPORT NO. 1**

Re: Dkt. No. 94

Plaintiff Adobe Systems, Incorporated (Adobe) filed this lawsuit, alleging that defendants made unauthorized sales of Adobe software. In Discovery Dispute Joint Report (DDJR) No. 1,<sup>1</sup> Adobe says that between June and August 2015, plaintiff served notices for the depositions of defendants, Osama Shamma (identified as defendants' sole employee who is primarily responsible for defendants' daily operations), and Delilah Kanou (identified as defendant Pierre Francis' wife, the corporate defendants' officer, and the point of contact for defendant Software Tech).

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<sup>1</sup> DDJR No. 1 is not really a "joint" report because it was unilaterally filed by Adobe. This court is told that, despite plaintiff's repeated efforts, defendants refused to meet-and-confer or to participate in the preparation of the report. This court has received no response to Adobe's discovery report.

According to Adobe, defendants (1) refused to cooperate in Adobe's attempts to schedule (and reschedule) the subject depositions; (2) failed to appear for their own depositions; and (3) refused to produce Shamma or Kanou for examination. Although defendants currently do not have an attorney, plaintiff noticed the subject depositions and attempted to schedule them at a time when all defendants were still represented by counsel. Moreover, even after defense counsel withdrew, this court is told that defendants either refused or ignored plaintiff's attempts to reschedule the examinations.

Plaintiff now asks for what amounts to a terminating sanction, i.e., an order striking defendants' answers for their failure to appear for deposition. Alternatively, plaintiff requests an order compelling defendants, Shamma, and Kanou to appear for deposition by a date certain. Adobe previously was willing to proceed with the depositions in Montreal; however, the deponents having flouted prior efforts to secure those depositions, Adobe now asks that the subject examinations be ordered to take place in the United States. Additionally, Adobe seeks an award of \$3,326.25 for reasonable fees and costs it says it incurred in the pursuit of these depositions. The matter is deemed suitable for determination without oral argument. Civ. L.R. 7-1(b). Upon consideration of DDJR No. 1, Adobe's request for sanctions is granted in part as follows:

If a party fails to appear for a properly noticed deposition, the court may sanction that party by, among other things, striking its pleadings in whole or in part. Fed. R. Civ. P. 37(d); 37(b)(2)(A)(iii).<sup>2</sup> Such sanctions are appropriate, even in the absence of a prior court order. Fed. R. Civ. P. 37(d); Hilao v. Estate of Marcos, 103 F.3d 762, 764-65 (9th Cir. 1996). "Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3).

Before ordering a terminating sanction under Fed. R. Civ. P. 37(d) for failure to appear at a

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<sup>2</sup> Other available sanctions for a party's failure to appear for deposition include orders deeming certain facts established; prohibiting the disobedient party from supporting or opposing designated claims or defenses or from introducing certain matters into evidence; and rendering default judgment against the disobedient party. Fed. R. Civ. P. 37(d)(3); 37(b)(2)(A).

1 deposition, the court must balance five factors: (1) the public's interest in expeditious resolution  
2 of litigation, (2) the court's need to manage its dockets, (3) the risk of prejudice to the party  
3 seeking sanctions, (4) the public policy favoring disposition of cases on their merits and (5) the  
4 availability of less drastic sanctions. Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir.1994)  
5 (citing Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir.1990)). The first two factors weigh in  
6 favor of the imposition of terminating sanctions, while the fourth factor cuts against it. "Thus the  
7 key factors are prejudice and the availability of lesser sanctions." Wanderer, 910 F.2d at 656.

8 This court finds that striking defendants' answers might well be justified. Plaintiff is  
9 entitled to obtain testimony on matters pertinent to this lawsuit, and the record presented indicates  
10 that each of the deponents likely has information that is relevant or reasonably calculated to lead to  
11 the discovery of admissible evidence. Defendants flatly refused to appear and to produce  
12 witnesses for the noticed examinations. They also ignored plaintiff's repeated efforts to schedule  
13 (and reschedule) the depositions.

14 Nevertheless, although fact discovery closed on October 2, 2015, there is reasonable time  
15 in the case schedule to accommodate the taking of these depositions without disrupting the  
16 remainder of the presiding judge's schedule. So, rather than strike defendants' pleadings at this  
17 time, this court grants plaintiff's alternate request for an order requiring the deponents to appear  
18 for deposition in the United States. No later than **November 16, 2015**, defendants shall appear in  
19 the United States for their respective depositions and shall also produce Shamma and Kanou for  
20 examination here. Defendants shall cooperate with plaintiff's counsel in scheduling these  
21 examinations.

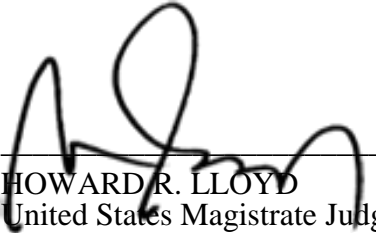
22 The denial of plaintiff's request for an order striking defendants' pleadings is without  
23 prejudice to Adobe to renew that request should defendants again fail to cooperate in the  
24 scheduling of the subject depositions, fail to appear for examination, or fail to produce Shamma  
25 and Kanou for deposition.

26 This court also grants Adobe's request for reasonable fees and costs incurred in pursuing  
27 these depositions. No later than October 23, 2015, Adobe shall submit evidence supporting the  
28 claimed sum of \$3,326.25. Should defendant Francis choose to respond to that supplemental

1 filing, he must file his response by October 30, 2015. If no response is filed by that date, then the  
2 matter of Adobe's requested monetary sanctions will be deemed submitted without further hearing  
3 or briefing unless otherwise ordered by this court.

4 SO ORDERED.

5 Dated: October 16, 2015

  
HOWARD R. LLOYD  
United States Magistrate Judge

United States District Court  
Northern District of California

5:14-cv-02140-RMW Notice has been electronically mailed to:

Christopher Quang Pham cpham@johnsonpham.com, cbrannan@johnsonpham.com,  
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Nicole L Drey ndrey@johnsonpham.com

5:14-cv-02140-RMW Notice sent by U.S. Mail to:

La Boutique du Softwaretech Inc.  
dba Software Tech and Software Tech Store  
7415 Gouin Boulevard West  
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Pierre Francis  
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